NO. 79-850

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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

TWIN HARBORS STEVEDORING CO.,

Petitioner,

v.

JAMES D. BACHTEL, DONNA BACHTEL AND MAMMOTH BULK CARRIERS, LTD.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LEVINSON, FRIEDMAN, VHUGEN, DUGGAN, BLAND & HOROWITZ

ROBERT D. DUGGAN
Attorney for Respondents

Office & Post Office Address:
1600 Seattle Tower
Seattle, WA 98101

ABCD AT CRAFTSMAN PRESS, SEATTLE

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Respondents-plaintiffs join in the Petition for Writ of Certiorari to review the Ninth Circuit decision relating to pro rata attorneys' fees under the Longshoremen's and Harbor Workers' Compensation Act and respectfully request that this court's decision in Bloomer v. Tung, 586 F.2d 908 (2d Cir. 1978), certiorari granted, No. 78-1418, argued Dec.

4, 1979, be withheld pending briefing and arguing of this case so that the two cases may be considered together.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 605 F.2d 438. The portion of the decision for which certiorari is sought appears at 605 F.2d 446-47.

QUESTION PRESENTED

From the proceeds of a judgment in a longshoreman's negligence action against the shipowner, is the longshoreman's employer entitled to 100% reimbursement of compensation paid, or should the reimbursement be subject to *pro rata* attorneys' fees and costs?

COUNTERSTATEMENT OF THE CASE

The background of the case is set forth in the Ninth Circuit's decision at 605 F.2d 438 (1979) at 446.

Stated briefly, at the time that the respondents-plaintiffs obtained a judgment against the defendant, petitioner-intervenor had paid respondents approximately $33,000.00 in compensation and medical benefits under the Longshoremen's and Harbor Workers' Compensation Act. The district court denied respondents' motion for pro rata attorneys' fees and the Ninth Circuit reversed, adopted a pro rata rule, following Swift v. Bolten, 517 F.2d 368 (4th Cir. 1975), and rejected the fund approach because "it places an unconscionable burden upon the injured person", 605 F.2d at 446. Under the fund approach, the plaintiff's lawyer gets paid in full, the plaintiff's employer gets reimbursed in full and plaintiff gets what is left. Under the pro rata rule adopted by the Ninth Circuit, the costs and fees incurred in obtaining the judgment are borne in proportion to the benefit received. Contrary to the assertions of petitioner, the pro rata rule does not force the compensation carrier to pay a pro rata attorney's fee

determined by "whatever contingency fee agreement has been entered into between plaintiff and his attorney". The district courts, under general equity powers, have jurisdiction to review the reasonableness of the fee assessed. Here the parties agreed that the fee was usual and customary. There was no objection as to reasonableness. Where there is such an objection, petitioner can litigate that issue before the district judge.

Although petitioner was permitted to intervene by stipulation early in the proceedings, petitioner-intervenor did not participate in the litigation. It was recognized that petitioner-intervenor's interest arose only after respondents-plaintiffs obtained a judgment against the defendant. Any attorneys' fees incurred by petitioner were not related to the negligence action but rather "in protecting its lien", i.e., its claim for full subrogation without deduction for attorneys' fees.

REASONS FOR GRANTING THE WRIT

1. The writ should be granted and this case considered with Bloomer v. Tung, No. 78-1418, which raises the issue in the context of settlement. There is a direct conflict in the circuits between the fund approach (First and Second), the pro rata approach (Fourth and Ninth), and an equitable approach adopted by the Fifth Circuit.

IMPORTANCE OF THE QUESTION

There is no question of the conflict in the circuits between the pro rata rule; Swift v. Bolten, 517 F.2d 368 (4th Cir. 1975); Bachtel v. Mammoth Bulk Carriers, 605 F.2d 438 (9th Cir. 1979); the fund rule; Cella v. Partenreederei M/S RAVENNA, 529 F.2d 15 (1st Cir. 1975), cert. denied, 425 U.S. 975 (1976) and Bloomer v. Tung, 586 F.2d 908 (2d Cir. 1978), cert. granted, No. 78-1418, (Oct. 1978 Term); and the equitable approach Mitchell v. Scheepvaart Maatschappij Trans-Ocean, 579 F.2d 1274 (5th Cir. 1978).

The basic question to be decided is whether the employer or its compensation carrier will be given a "free ride" in third party litigation at the expense of the injured plaintiff or his lawyer. Under the fund rule, the injured plaintiff always nets less from a third party recovery. Under the pro rata rule, the plaintiff almost always nets more, the exception being in those cases where the judgment is less than or barely exceeds the compensation paid. The Ninth Circuit specifically reserved decision in that situation. The amount a plaintiff nets is a primary question in the settlement of any third party case. A rule which ensures that the employer-carrier will pay pro rata costs and attorney's fees whether the case is tried or settled will encourage settlements. Whereas, under the "fund rule" the plaintiff is encouraged to try his case in the hope of obtaining a verdict large enough to pay his lawyer a fee based on the gross verdict, then his employer 100% subrogation, then the costs of suit.

Petitioner's footnote suggestion that the attorney's fee be based on the net recovery to the plaintiff (verdict-subrogation) begs the issue, since in that case it would be plaintiff's lawyer who would be subsidizing the employer, rather than the plaintiff. The issue presented here, and in a different context in Bloomer v. Tung No. 78-1418, argued Dec. 4, 1979, directly affects the trial and settlement of all third party actions under the Longshoremen's and Harbor Workers' Compensation Act. We respectfully suggest that the decision in Bloomer v. Tung be held in abeyance pending the briefing and arguing of this case.

Respectfully submitted,

LEVINSON, FRIEDMAN, VHUGEN,
DUGGAN, BLAND & HOROWITZ

By ROBERT D. DUGGAN

Attorney for Respondents
Bachtel